COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. FAR - 27640

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

2018-P-1642

COMMONWEALTH,
Appellee,

V.

CARLOS HUNTER,
Defendant-Appellant

REQUEST FOR FURTHER APPELLATE REVIEW
FROM A DECISION OF THE MASSACHUSETTS APPEALS COURT

BRIEF OF THE APPELLANT, CARLOS HUNTER

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REQUEST FOR LEAVE TO FILE APPLICATION FOR FURTHER APPELLATE REVIEW

Defendant Carlos Hunter ("Defendant") hereby requests further appellate review of the Appeals Court's Memorandum and Order Pursuant to Rule 1:28 in Commonwealth v. Hunter, No. 18-P-1642 (April 22, 2020). (Attached hereto as Addendum ("Add.) at pp. 27-35.)

In the instant case, the Appeals Court mistakenly applied the criteria set forth in this Court's decision in Commonwealth v. Carrillo, 483 Mass. 269, 278 (2019). The less than one-year old Carrillo decision addressed the "sufficiency of the evidence to support a finding of proof beyond a reasonable doubt, rather than probable cause," for the first time in a case involving involuntary manslaughter based on the transfer of drugs. The Appeals Court's decision here negatively impacts the import of the Carrillo case. Moreover, the Appeals Court compounded that error by ruling that Defendant was not unfairly prejudiced by the Trial Court's erroneous admission of a subsequent bad act, which evidence had the improper purpose of establishing Defendant's propensity to commit the alleged crime.

As such, the interests of justice require this Court to grant Defendant's Request for Further Appellate

Review.

STATEMENT OF THE CASE

On July 27, 2016, Defendant was indicted on a single count of involuntary manslaughter based on the overdose death of Joshua Miller, to whom Defendant allegedly sold heroin laced with fentanyl.

The Commonwealth filed a Motion in Limine seeking permission to introduce evidence of a subsequent bad act; an undercover buy that occurred two weeks after Mr. Miller overdosed. Over Defendant's objection, the trial judge allowed the motion to admit the subsequent bad act. In doing so, the trial judge twice mistakenly articulated the applicable standard, by stating that the probative value was "not substantially outweighed by the danger of undue prejudice." (Emphasis added.) As the trial judge discussed the applicable standard, the judge also repeatedly and erroneously used the word "substantially" in assessing the weight of the factors to balance.

Following a seven-day trial, a jury convicted Defendant of involuntary manslaughter. Defendant filed a timely notice of appeal.

On appeal, Defendant challenged the sufficiency of the evidence, and the improper admission of a subsequent

bad act by Defendant. On January 7, 2020, the Appeals Court ordered the parties to submit a supplemental brief addressing Commonwealth v. Carrillo, 483 Mass. 269. Specifically, the Appeals Court requested the parties to address the import of Carrillo, if any, "with respect to both the sufficiency of the evidence and the defendant's claim that the judge erred in admitting evidence regarding a subsequent drug sale."

On April 22, 2020, the Appeals Court affirmed Defendant's conviction. In doing so, the Appeals Court rejected Defendant's contention that the evidence was insufficient to sustain a conviction of involuntary manslaughter:

> Although we consider the question close, we agree with the Commonwealth that -- viewing the evidence in the light most favorable to the Commonwealth -- jurors reasonably could conclude that the defendant knew that the heroin he was selling was especially potent and therefore particularly dangerous, particularly where there was evidence that the defendant was cutting and packaging his own drugs.

(Add. at p. 31)(Emphasis added.)[1]

[1] The Appeals Court found that Defendant cut and packaged his own drugs, which is inconsistent with its finding that he told Mr. Miller he likes to sell the product just as he gets it (Add. at p. 30n.1.), and even though there was no evidence that Defendant knew or should have known the heroin he allegedly sold Mr. Miller was laced with fentanyl. (Add.at p. 31n.3.)

Then, with respect to the subsequent bad act, the Appeals Court found: “We conclude that even if some of the evidence regarding the undercover buy would have been excluded had the judge applied the proper test, the error had, at most, ‘but very slight effect.’" (Add at p. 34.)

On July 9, 2020, Defendant’s then counsel moved to withdraw and to stay the time for filing a Request for Further Appellate Review. This Court granted Defendant’s Motion on the condition that substitute counsel file their appearance, and ordered that Defendant’s Application be filed by August 7, 2020. Defendant’s current counsel entered his appearance on August 3, 2020, and sought an extension of time to file the application until August 17, 2020, which extension was granted.

STATEMENT OF FACTS

The Death of Joshua Miller

Joshua Miller was a heroin addict, residing in a sober house. On July 13, 2015, his girlfriend, Christina Brisendine, went to the sober house following work. After napping in Mr. Miller’s room, she arose and found him on the bathroom floor. His body was blue and something was coming out of his mouth and nose.

Ms. Brisendine called 9-1-1. Before police arrived, Miller's brother, Keith McEvoy, went to the sober house and observed the body. McEvoy then discarded a bag of narcotics and a syringe from Mr. Miller's bathroom because he wanted to protect Mr. Miller from being caught with drugs and paraphernalia should he be revived. McEvoy did not tell police that he disposed of drug evidence until two days prior to trial.

Emergency personnel arrived and transported Mr. Miller to the emergency room of a local hospital where he was pronounced dead.

Mr. Miller's Cause of Death

Dr. Katherine Lindstrom, a forensic pathologist, performed Miller's autopsy and determined that his blood was positive for drugs. She determined the cause of Mr. Miller's death was "acute fentanyl and heroin intoxication," with the fentanyl predominant. Dr. Lindstrom could not determine when the drugs were ingested.

Contact Between Defendant and Mr. Miller On July 13, 2015.

On July 13, 2015, there was activity between Defendant and Mr. Miller's cellular phones. Mr. Miller

texted “I need a G” and proposed a meeting.[2] Further communication between the cellular phones ensued. Eventually, a meeting was allegedly arranged when Mr. Miller texted “Pull in the store next to Monty’s [sic].”[3]

Evidence Whether Mr. Hunter Knew Or Should Have Known His Conduct Allegedly Created A High Degree Or Likelihood Of Substantial Harm, Such As An Overdose Or Death.

The Appeals Court referenced particular evidence as bearing on whether Defendant knew or reasonably should have known that the heroin he allegedly sold to Mr. Miller created a high degree or likelihood of an overdose or death. Specifically, on July 8, 2015 (five days before Mr. Miller’s death), the Defendant sent a text message to a customer referred to as "Ee" announcing "Fire!!" According to the Commonwealth's expert, "fire" is a measure of potency, with "fire" or "straight fire" denoting "the hottest stuff [customers] can get a hold of … [t]he strongest stuff [dealers] have." (Add. at pp. 30-31.)

Two days later, the Defendant sent text messages to Ee and others indicating that he had "straight fire."

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[2] A “G” refers to a gram.

[3] Monty’s Restaurant is located down the street from Mr. Miller’s residence.

One of those text messages stated that he had "new shit" that was "STR8 [three fire emojis]." (Add. at pp. 31 and n.2) In other texts, the Defendant wrote: "one of my everyday [people] said that I was giving him better stuff but that it was still good but that it was better" and "this got everybody calling twice a day." (Add. at p. 31.)

On July 13, 2015, before the Defendant met with Mr. Miller to conduct the sale, Defendant texted Ee: "I been having rocket fuel the last few days." Then, at 7:15 that night, about two hours after the alleged sale to Mr. Miller, Defendant texted Ee stating he had "been consistently blessing [Ee] with straight fire" and that people had "been telling [him] that it's gotten better." (Add. at p. 31.)

Significantly, there was no evidence that Defendant discussed with Mr. Miller the potency of the heroin that Mr. Miller allegedly purchased, or that Defendant knew or should have known that the alleged heroin was laced with fentanyl. While the Appeals Court found it significant that Defendant was “a professional dealer familiar with cutting and packaging heroin,” it noted the following text by Defendant to Mr. Miller:

> [I]n the days leading up to the victim's overdose, the victim and the defendant were negotiating purchase price. In response to one of the victim's offers, the defendant texted: "I can do those numbers if I throw some cut in it, but I'd rather give everybody jus [sic] as I get it."

(Add. at p. 30 and n.1.)(Emphasis added.) Thus, the Appeals Court's reliance on its finding that Defendant was familiar with cutting and packing heroin was undercut by noting that Defendant told Mr. Miller that he would rather sell the product "jus[sic] as he received it." Put simply, that text by Defendant cast reasonable doubt on whether he "cut" the heroin that he allegedly sold to Miller.

Further casting reasonable doubt on whether Defendant had the requisite knowledge to support an involuntary manslaughter conviction, the Appeals Court noted: "To be clear, we do not rely on there being evidence to support the jury's finding that the defendant knew or should have known that the heroin he was selling was laced with fentanyl." (Add. at p. 31n.3.) Thus, as significant here, there was no evidence that Defendant knew or should have known that the heroin he allegedly sold to Mr. Miller was laced with fentanyl.

Subsequent Bad Act

Fifteen (15) days following Mr. Miller's death,

namely on July 28, 2015, while working undercover for the Lynn Police Department, Michael DiMeglio ("DiMeglio") communicated with Defendant by telephone to set up a drug deal. After exchanging text messages, DiMeglio went to a convenience store to conduct the deal. Defendant pulled up in a car, exited the vehicle, and signaled the undercover officer.

DiMeglio notified the officers conducting surveillance that the dealer had arrived. He rolled down his passenger window and Defendant leaned in. DiMeglio gave money to Defendant, who in turn dropped three bags of suspected heroin in DiMeglio's hand. Defendant was then arrested.

The Appeals Court found the following with respect to what Defendant sold DiMeglio: [1] "[t]he substance [Defendant] sold was tested and determined to contain fentanyl," and [2] "what [Defendant] was selling at that later time contained fentanyl."[4] Of particular importance, however, this finding fails to mention that the chemical analysis of the subsequent sale found no trace of heroin found in the three bags tested. (Tr. V at pp. 18-19.) Specifically, Timothy Woods, a

[4] (Add. at pp. 32,34.)

supervisor with the Massachusetts State Police Crime Laboratory, testified about the test results on the three bags:

> Q Now, the items that tested positive as fentanyl, they tested positive as only fentanyl, correct?
>
> A Fentanyl was the only substance that was identified.
>
> Q There was no heroin mixed in with the fentanyl, correct?
>
> A Not that we detected.

(Tr. V at p. 19.) Consequently, the evidence indisputably established that the subsequent bad act of July 28, 2015, involved a very different substance than the substance allegedly sold by Defendant to Mr. Miller on July 13, 2015.

ISSUES FOR WHICH FURTHER APPELLATE REVIEW IS SOUGHT

I. Whether the Appeals Court incorrectly applied this Court's recent decision in Carrillo and concluded that there was sufficient evidence to sustain Defendant's conviction based solely on his bragging about the potency of the alleged heroin he was selling to people other than Mr. Miller, and where, as here, there was no evidence that Defendant knew or should have known that the heroin he allegedly sold to Mr. Miller was laced with fentanyl.

II. Whether the Appeals Court should have reversed Defendant's conviction because of the Trial Judge's improper admission of a subsequent bad act. Contrary to the Appeals Court's conclusion, Defendant was highly prejudiced by the erroneous admission of the subsequent sale of a product that contained fentanyl which product was different from the heroin laced with fentanyl, which caused Mr. Miller's death, particularly since the Appeals Court concluded that the sufficiency of the evidence was a "close question," in light of the recent Carrillo case, and because the subsequent bad act was used for the improper purpose of proving Defendant's alleged propensity to sell product with fentanyl.

WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

Further Appellate Review Of The Appeals Court's Decision Is Warranted, In The Interests Of Justice And In Light Of The Carrillo Case, Where Defendant's Conviction Was A "Close Question" Supported Only By Evidence Of Defendant's Bragging About The Potency Of The Heroin, And Where The Trial Judge Erroneously Allowed The Commonwealth To Introduce Evidence Of A Subsequent Bad Act For The Impermissible Purpose Of Establishing Defendant's Propensity To Sell Product Containing Fentanyl.

While the instant appeal was pending, this Court decided the case of Commonwealth v. Carrillo, 483 Mass.

at 270, a case of first impression, in which this Court ruled:

> [T]he mere possibility that the transfer of heroin will result in an overdose does not suffice to meet the standard of wanton or reckless conduct under our law. The Commonwealth must introduce evidence showing that, considering the totality of the particular circumstances, the defendant knew or should have known that his or her conduct created a high degree of likelihood of substantial harm, such as an overdose or death.

(Emphasis added.)

At its core, Carrillo stands for the proposition that even selling a drug as inherently dangerous as heroin is insufficient to prove manslaughter. There must be a "plus factor." See Commonwealth v. Velasquez, 48 Mass.App.Ct. 147, 150 (1999). In Carrillo, this Court set forth the following examples that would satisfy the "plus factor:"

> [T]he defendant knew or should have known that the heroin was unusually potent or laced with fentanyl; evidence that [victim] was particularly vulnerable to an overdose because of his age, use of other drugs, or prior overdoses; or evidence that the defendant knew or should have known that [victim] had overdosed but failed to seek help.

483 Mass. at 271. Absent such evidence, this Court concluded that the Commonwealth failed to prove beyond a reasonable doubt that Defendant knew or should have

known that his conduct created a high degree or likelihood of an overdose or death. 483 Mass. 271.

In this case, the Commonwealth never established that Defendant knew, or should have known, it was highly likely that Mr. Miller would overdose or die from the heroin Mr. Miller allegedly purchased from him, nor that Defendant knew he was selling anything aside from heroin. There was no evidence that Defendant was aware of any person overdosing or dying from the alleged product he sold. Indeed, the Appeals Court noted: "[W]e emphasize that there was no evidence at trial that the death of the victim had been publicized in the intervening two weeks, or that -- at the time the defendant engaged in the undercover buy -- he otherwise had become aware that one of his customers had overdosed." (Add. at p. 34n.5.)

Here, the Commonwealth's case rested on Defendant's bragging about the potency of the product (although not that it contained fentanyl). Carrillo does not permit a finding of guilt on these facts. While the Appeals Court also referred to evidence that the Defendant was cutting and packaging his own drugs, that reasoning was undercut by the Appeals Court's reliance on Defendant's text during negotiations with Mr. Miller that Defendant could

“do those numbers if I [Defendant] throw some cut in it, but I'd rather give everybody jus[sic] as I get it." Therefore, the Appeals Court’s own finding that Defendant liked to pass on product just as he got it was completely at odds with its rationale that Defendant knew or should have known of the potency of the heroin because he cut and packaged the product.

The Appeals Court’s decision is further undercut by footnote 3 of its decision, wherein it expressly acknowledged that it did not determine that there was evidence that Defendant knew or should have known that the heroin he allegedly sold Mr. Miller was laced with fentanyl, let alone that it had any fentanyl. (Add. at 31n.3.) Put simply, the Appeals Court acknowledged that there was no evidence that Defendant knew or should have known that the heroin allegedly sold to Mr. Miller contained fentanyl.

Boiling the Appeals Court’s decision to its essence, this case turned on whether the Defendant’s bragging about the potency of the product constituted sufficient evidence to prove he knew or should have known the product he allegedly sold to Mr. Miller created a high degree or likelihood of causing an overdose or death. Though considering “the question close,” the

Appeals Court ruled that it was for the jury to decide "whether the references to 'straight fire' and 'rocket fuel' amounted to mere puffery or instead showed knowledge that the heroin in question was particularly potent." (Add. at pp. 31-32.) Defendant submits that, under Carillo, reasonable jurors could not conclude that Defendant knew the product he was allegedly selling was particularly dangerous based solely on his bragging.

In light of the extremely thin evidence supporting Defendant's involuntary manslaughter conviction under Carillo, and the Appeals Court's recognition that the sufficiency of the evidence was a "close question," further appellate review of the Appeals Court is warranted because the Appeals Court failed to reverse Defendant's conviction based on the improper admission of highly prejudicial subsequent bad act evidence.

The Appeals Court acknowledged that the Trial Court erroneously admitted subsequent bad act evidence that Defendant "was selling 'fire' two weeks after his sale to the victim, and the fact that what he was selling at that later time contained fentanyl." (Add. at p. 34.) However, the Appeals Court nevertheless concluded that the error had, at most, a "very slight effect." (Add. at p. 34), citing Commonwealth v. Rosario, 430 Mass. 505,

514 (1999). This Court should grant further appellate review to correct the Appeals Court's erroneous ruling that Defendant was not prejudiced by the improper admission of such evidence.

The Appeals Court's reasoned "that subset of evidence essentially was duplicative of the other admitted evidence…." (Add. at p. 34.) Yet, that is not the case. Unlike the subsequent sale to DiMeglio on July 28, 2015, there was no direct evidence that Defendant, in fact, sold any drug to Mr. Miller on July 13, 2015. Moreover, unlike the subsequent sale, the Commonwealth could not test any drugs that Mr. Miller possessed on the day he died because Mr. Miller's brother disposed of the narcotics and paraphernalia in the decedent's possession before police arrived at the scene.

Additionally, the substance Defendant sold two weeks after Mr. Miller's death was very different from the substance that allegedly killed Mr. Miller. The substance sold on July 28, 2015, contained fentanyl but not heroin, whereas the substance that allegedly killed Mr. Miller was heroin laced with fentanyl.

Given the big difference between the drug that killed Mr. Miller and the one Defendant sold to DiMeglio on July 28, 2015, the jury did not need to know that two

weeks after Mr. Miller died, Defendant bragged about the potency of his product to a customer, and sold that customer a substance that contained fentanyl, without any trace of heroin. Simply put, there was no benefit to the jury learning about the subsequent bad act since it was not merely duplicative of the evidence of the alleged act from which the instant case arises which required the fact finder to infer that Defendant sold heroin laced with fentanyl to Mr. Miller. Rather, the evidence of the subsequent bad act showed directly Defendant selling a substance with fentanyl to an under cover officer.

It is axiomatic that "admission of such evidence carries with it a high risk of prejudice to the defendant." Commonwealth v. Anestal, 463 Mass. 655, 672 (2012). That is why this Court requires application of a more exacting standard to determine admissibility of other bad act evidence; to avoid unfair prejudice by inviting a finding of guilty by propensity. Commonwealth v. Crayton, 470 Mass. 228, 249 & n.27 (2014). It is well established that unfair prejudice results when evidence of other bad acts is admitted and used to indicate the Defendant's propensity to commit such acts. See, e.g., Commonwealth v. Rosario, 430 Mass.

at 509–510 (1999); Commonwealth v. Fidalgo, 74 Mass. App. Ct. 130, 133 (2009).

That, however, is what occurred in this case. In its closing, the Commonwealth argued that the subsequent bad act on July 28th showed that Defendant sold fentanyl and it emphasized the drug's potency. This establishes that the Commonwealth used the improperly admitted bad act to argue Defendant's propensity to commit the crime. In light of the "close question" presented as to the sufficiency of the evidence under Carillo, the Appeals Court erroneously ruled that Defendant was not unfairly prejudiced by the admission of the subsequent bad act.

In the instant case, the Appeals Court lacked "the requisite assurance that the error had little or no effect on the jury's assessment of the evidence." Commonwealth v. Hrabak, 440 Mass. 650, 656 (2004). "Because [] the introduction of the improper and unduly prejudicial [subsequent bad act] was likely to have influenced the jury's conclusion, a new trial is required." Commonwealth v. Wardsworth, 482 Mass. 454, 477 (2019).

CONCLUSION

For the above reasons, the interests of justice require that this Court grant Defendant's Request for

Further Appellate Review to correct the errors made by the Appeals Court, which errors substantially violate Defendant's rights.

Respectfully Submitted,
Carlos Hunter,

By his attorney,

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Date: 08/17/20

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Rule 16(a)(1), (3), (4), (9), and (11)-(15); Rule 20(2)(B) and Rule 21(redaction). Compliance of the applicable length limit of Rule 20(2)(B) of the Massachusetts Rules of Appellate Procedure were ascertained by using Courier New font, 12 characters per inch, and no more than ten (10) pages total and with no non-excluded pages as to why this request for further appellate review should be granted. I certify that the information in this Certificate is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Barry A. Bachrach
Barry A. Bachrach

CERTIFICATE OF SERVICE

Commonwealth v. Carlos Hunter
Docket No.: FAR-27640

Pursuant to Rules 13 and 19 of the Massachusetts Rules of Appellate Procedure and E-Filing Rule 7, the undersigned counsel for Defendant, Carlos Hunter, hereby certify that on this 17th day of August, 2020, the Defendant/Appellant's Petition for Further Appellate Review was submitted through the Electronic Filing Service Provider for electronic service to the following counsel of record:

Catherine L. Semel, ADA
Catherine P. Sullivan, ADA
Office of the District Attorney/Essex
Ten Federal Street
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Signed under the pains and penalties of perjury this 17th day of August, 2020.

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1642

COMMONWEALTH

vs.

CARLOS HUNTER.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth indicted the defendant for involuntary manslaughter based on the overdose death of someone (victim) to whom the defendant allegedly sold heroin laced with fentanyl. A Superior Court jury convicted the defendant following a seven-day trial. On appeal, the defendant challenges the sufficiency of the evidence, and he argues that the judge erred in admitting evidence of a subsequent bad act. We affirm.

1. Sufficiency. In reviewing a claim of insufficiency, we view the evidence adduced at trial in the light most favorable to the Commonwealth, drawing all reasonable inferences therefrom, to determine whether the evidence was sufficient to persuade any rational jury to find the essential elements of the crimes charged beyond a reasonable doubt. Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

In his original and reply brief, the defendant challenged the sufficiency of the evidence only with regard to whether he sold the victim the drugs that led to the overdose. This claim requires little discussion, because the evidence on this point was extremely robust. Cell phone text messages between the defendant and the victim reveal that in the hours before the victim's death the two of them had an extensive "conversation" during which the victim sought to purchase a gram of heroin from the defendant. The victim's inquiries had a desperate tone, and rational jurors could infer that he was in great need of what is commonly known as a "fix." The defendant and the victim agreed to meet at a particular location ("the store next to Monty's") to effect a sale. At 5:31:32 P.M., the defendant texted that he was "Almost at store," and the victim texted eighteen seconds later, "I'm here." From these well-documented communications, jurors reasonably could infer, beyond a reasonable doubt, that the defendant sold the victim a gram of heroin shortly after 5:31 P.M. This was less than forty-five minutes before 6:15 P.M., the approximate time the victim's girlfriend found the victim in a locked bathroom lying on the floor "blue" with "stuff coming out of his mouth and his nose." Based on such inferences and the defendant's evident desire to ingest the heroin quickly, the jury readily could infer -- again, beyond a reasonable doubt -- that the drugs that the defendant sold the

victim are what caused the victim to overdose and subsequently to die.

After the parties submitted their appellate briefs, the Supreme Judicial Court published its opinion in Commonwealth v. Carrillo, 483 Mass. 269 (2019). In that case, the court clarified what the Commonwealth needed to prove to make out an involuntary manslaughter case in the context of a drug overdose death. Specifically, the court held that "[t]he Commonwealth must introduce evidence showing that, considering the totality of the particular circumstances, the defendant knew or should have known that his or her conduct created a high degree of likelihood of substantial harm, such as an overdose or death." Id. at 270. In making such a showing, it is not enough for the Commonwealth to rely on "the inherent possibility of substantial harm arising from the use of heroin." Id. at 271. Rather, the Commonwealth must prove that the possibility of substantial harm, "which is present in any distribution of heroin -- had been increased by specific circumstances to create a high degree of likelihood of substantial harm." Id. The court enumerated examples of such circumstances that would suffice, including "evidence that the defendant knew or should have known that the heroin [he sold] was unusually potent or laced with fentanyl." Id.

Where the defendant before us had challenged the sufficiency of the Commonwealth's evidence, albeit with regard to a different element of the crime, we requested supplemental briefing for the parties to address the import of Carrillo with respect to the arguments the defendant had raised. We turn now to that issue.

The Commonwealth argues that Carrillo was satisfied based on evidence that the defendant knew or should have known that what he sold to the victim was "unusually potent." Specifically, the Commonwealth relies on representations that the defendant had made to potential customers close in time to his sale to the victim about the potency of the product he was selling. Before reviewing that evidence, it bears noting that unlike the defendant in Carrillo -- who was a fellow user who agreed to pick up heroin for the victim in that case -- the defendant here was a professional dealer familiar with cutting and packaging heroin.[1] Carrillo, 483 Mass. at 272.

On July 8, 2015 (five days before the victim's overdose), the defendant sent a text message to a customer referred to as "Ee" announcing "Fire!!" According to the Commonwealth's expert, "fire" is a measure of potency, with "fire" or "straight

[1] For example, in the days leading up to the victim's overdose, the victim and the defendant were negotiating purchase price. In response to one of the victim's offers, the defendant texted: "I can do those numbers if I throw some cut in it, but I'd rather give everybody jus [sic] as I get it."

fire" denoting "the hottest stuff [customers] can get a hold of . . . [t]he strongest stuff [dealers] have." Two days later, the defendant sent text messages to Ee and others indicating that he had "Straight fire."[2] On July 13, 2015, just minutes before the defendant met with the victim to conduct the sale, the defendant sent Ee another text stating that "I been having rocket fuel the last few days." Then, at 7:15 that night (that is, less than two hours after the sale to the victim), the defendant sent a text message to Ee stating that he had "been consistently blessing [Ee] with straight fire" and that people had "been telling [him] that it's gotten better."

Although we consider the question close, we agree with the Commonwealth that -- viewing the evidence in the light most favorable to the Commonwealth -- jurors reasonably could conclude that the defendant knew that the heroin he was selling was especially potent and therefore particularly dangerous, particularly where there was evidence that the defendant was cutting and packaging his own drugs.[3] In coming to this conclusion, we recognize that some degree of "puffery" might be

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[2] One of those text messages stated that he had "new shit" that was "STR8 [three fire emojis]." In other texts the defendant wrote: "one of my everyday [people] said that I was giving him better stuff but that it was still good but that it was better" and "this got everybody calling twice a day."

[3] To be clear, we do not rely on there being evidence to support the jury's finding that the defendant knew or should have known that the heroin he was selling was laced with fentanyl.

expected from a professional dealer. However, in our view, whether the references to "straight fire" and "rocket fuel" amounted to mere puffery or instead showed knowledge that the heroin in question was particularly potent was for the jury to decide.[4] We therefore conclude that the evidence was sufficient under the test enunciated in Carrillo.

2. Subsequent bad act. The defendant separately challenges the admission of evidence of an undercover drug buy that occurred approximately two weeks after the victim overdosed. From the victim's cell phone, the police were able to discern the phone number of the person that had sold the victim the drugs just before his overdose. They called and texted that phone number seeking to arrange a purchase of "brown," a street name for heroin. In the course of those communications, the defendant acknowledged that what he had to sell was "fire." After the undercover sale took place, the police arrested the defendant. The substance he sold was tested and determined to contain fentanyl.

The Commonwealth filed a motion in limine seeking permission to introduce evidence of the undercover buy. The defendant opposed this, and there was a discussion of the issues

[4] The defendant has not challenged the adequacy of the jury instructions he received, and we did not request briefing with regard to that issue. We do not address that issue in today's memorandum and order.

outside of the jury's presence. That discussion reveals that the judge carefully considered both the probative value of the subsequent bad act evidence and its potential for undue prejudice. It also reveals, however, that the judge applied the wrong test in weighing those factors, with the judge repeatedly having referred to whether any undue prejudice "substantially outweighed" the probative value. See Commonwealth v. Crayton, 470 Mass. 228, 249 n.27 (2014) (clarifying that proper test is whether undue prejudice "outweighed" probative value, not whether it "substantially outweighed" it). While objecting to the introduction of the evidence, the defendant did not specifically call the judge's attention to her employing an incorrect legal standard. Nevertheless, we will assume arguendo that the defendant preserved his claim of error and that the prejudicial error test therefore applies.

We agree with the Commonwealth that the basic facts regarding the undercover drug buy had high probative value. Simply put, such evidence demonstrated that it was the defendant who was the person who used the phone in question to sell drugs to the victim. In addition, while the defendant's use of the phone to sell drugs certainly was prejudicial to the defendant, it is not at all apparent how it was "unduly" prejudicial. Based on this, we are confident that had the judge applied the

correct legal standard, she would have allowed in evidence the basic facts of the undercover sale.

That said, we cannot say with the same confidence that the judge would have allowed all of the evidence regarding the undercover buy that she did, such as the defendant's acknowledgement that he was selling "fire" two weeks after his sale to the victim, and the fact that what he was selling at that later time contained fentanyl. However, that subset of evidence essentially was duplicative of the other admitted evidence referenced above.[5] In addition, at the defendant's request, the judge gave repeated limiting instructions to the jury, advising them that they "may not take[] any of the Defendant's subsequent actions as a substitute for proof that the Defendant committed the crimes charged here nor may [they] consider them as proof that the Defendant has a criminal personality or bad character." We conclude that even if some of the evidence regarding the undercover buy would have been excluded had the judge applied the proper test, the error had, at most, "but very slight effect." Commonwealth v. Rosario, 430

[5] In stating that conclusion, we emphasize that there was no evidence at trial that the death of the victim had been publicized in the intervening two weeks, or that -- at the time the defendant engaged in the undercover buy -- he otherwise had become aware that one of his customers had overdosed.

Mass. 505, 514 (1999), quoting Commonwealth v. Gilday, 382 Mass. 166, 178 (1980).

Judgment affirmed.

By the Court (Wolohojian, Milkey & Shin, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: April 22, 2020.

[6] The panelists are listed in order of seniority.